Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROBERT A. SCHMIDT, Shawano County Sheriff,

Petitioner,

v.

JOSEPH L. VAN PATTEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Seventh Circuit exceed its authority under 28 U.S.C. § 2254(d)(1) by holding that the Wisconsin Court of Appeals rendered a decision "contrary to . . . clearly established Federal law" when the Wisconsin court relied on *Strickland v. Washington*, 466 U.S. 668 (1984), rather than *United States v. Cronic*, 466 U.S. 648 (1984), to analyze respondent's claim that his counsel provided ineffective assistance at a no-contest plea hearing because counsel participated via speakerphone rather than by physically appearing in court?

2. Did the Seventh Circuit exceed its authority under 28 U.S.C. § 2254(e)(1) when it relied on facts contrary to those found by the Wisconsin state courts and on debatable inferences from the facts?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert A. Schmidt[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit (App. A1-14) appears in the Federal Reporter as *Van Patten v. Deppisch*,

[1] In the wake of the decision and order of the Seventh Circuit and a further order of the district court, Jodine Deppisch, warden of Fox Lake Correctional Institution and the respondent-appellee in the Seventh Circuit, transferred custody of Van Patten to Shawano County Sheriff Robert A. Schmidt.

434 F.3d 1038 (7th Cir. 2006). The decision and order of the district court (App. A18-30) and the magistrate judge's recommendation to the district judge (App. A31-40) are unreported. The decision of the Wisconsin Court of Appeals (App. A41-46) is unreported.

JURISDICTION

The Seventh Circuit entered its judgment on January 4, 2006 (App. A15-16). The Seventh Circuit entered its order denying the petition for rehearing and rehearing *en banc* on February 27, 2006 (App. A17). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, § 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

In the AEDPA, Congress strictly constrained the authority of federal courts to grant habeas relief to State prisoners. As pertinent to this case, a federal court can grant the writ only if the State court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). And when reviewing an application for habeas relief, the federal court must accept as correct "a determination of a factual issue made by a State court" unless the habeas applicant "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The Seventh Circuit's decision runs afoul of both limitations. The underlying legal issue is whether respondent's Sixth Amendment right to effective counsel was violated because his counsel participated in a no-contest plea hearing by speakerphone. In *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court established that the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984), applies to ineffective-assistance-of-counsel challenges to

guilty or no-contest pleas. In this case, the Wisconsin Court of Appeals relied on *Hill* and *Strickland* to review respondent's claim of ineffective assistance of counsel at his plea hearing. Relying on the trial court's factual finding that respondent was not prejudiced in the slightest by his counsel's conduct, the State appellate court affirmed the conviction.

The Seventh Circuit granted habeas relief based on its conclusion that the Wisconsin Court of Appeals' reliance on *Strickland* was "contrary to" clearly established law. According to the Seventh Circuit, providing counsel via speakerphone does not differ at all from providing no counsel at all, and therefore fits within one of the exceptions to *Strickland* identified in *United States v. Cronic*, 466 U.S. 648 (1984). The court reached that conclusion even though it acknowledged that this Court has never addressed a similar situation (App. A1), and even though none of the *Cronic* exceptions unquestionably applies. The court also reached this conclusion by rejecting the State courts' factual findings and ruling instead that respondent was in fact prejudiced by his counsel's conduct.

The Seventh Circuit's decision thus presents an issue of critical importance to all federal and State courts: will the federal courts abide by the limits Congress imposed on the issuance of federal habeas corpus relief?

In urging review, petitioner does not condone, recommend, or encourage the practice of defense counsel assisting clients by telephone rather than in person at court proceedings, even in nonadversarial hearings such as the plea hearing in this case. Nor does petitioner ask this Court to condone, recommend, or encourage the practice. Rather, petitioner has only one interest in this case: the proper application of the standards Congress established for federal courts' review of State prisoners' applications for habeas relief. Perhaps, under similar facts in a federal case, the Seventh Circuit could have properly reached in a direct federal appeal the same result it reached here.

This case, however, arose under the AEDPA, not on direct appeal. Under the AEDPA, the Seventh Circuit could not reach this result and remain faithful to the congressionally imposed limits.

STATEMENT OF THE CASE

A. Wisconsin State Court Proceedings.

1. Pre-plea proceedings.

This case began with the killing of Todd Anderson by a bullet fired into the back of his head (Answer to Petition for Writ of Habeas Corpus, Ex. I at 11; *see also id.* at 7-11 (detailed facts about the crime)).[2] The State of Wisconsin charged Van Patten with first-degree intentional homicide (Ex. C at 1). Attorney James Connell represented Van Patten for "the eight or nine months . . . before the [scheduled] trial" (Ex. J at 33). The Shawano County Division of the Menominee/Shawano Circuit Court scheduled the trial to begin on Monday, September 18, 1995 (*id.* at 36).

2. Plea hearing.

On Tuesday, September 12, 1995 — six days before the scheduled starting date of the trial — Van Patten pled "no contest" to a reduced charge of first-degree reckless homicide (Ex. A; Ex. H at 5, 15, 17; Ex. J. at 4).

The plea followed a period of several days before and including September 12 during which Connell had "numerous conversations with Mr. Van Patten and with [Dis-

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[2] Subsequent citations to exhibits attached to the Answer to Petition for Writ of Habeas Corpus will take this form: "Ex. ___".

trict Attorney Gary R.] Bruno" (*id.* at 35); one of the earliest conversations with Bruno occurred on Friday, September 8 (Ex. H at 3). A final "lengthy [telephone] conversation" between Connell and Van Patten occurred around noon on September 12 (Ex. J. at 5, 35). At the plea-withdrawal hearing, Van Patten said the conversation lasted more than thirty minutes (*id.* at 6), with "Mr. Connell . . . going through telling me that it would be better for me to take a plea bargain versus going to jury trial, and . . . just discussing some of the evidence and stuff" (*id.* at 5). After the conversation, Connell told Bruno "that we had agreed to accept his latest proposal, and then apparently this plea hearing was set and set in a relatively short period of time from the time of our last conversation" (*id.* at 35). The rapid arrangement of the hearing created a scheduling conflict for Connell (Ex. J at 35-37), who participated in the plea hearing via a speakerphone (Ex. H at 2).

At the plea hearing, the circuit court advised Van Patten that "[i]f you have any trouble understanding any question, take all the time you need to confer with your attorney, and we can perhaps get him on the line in a private place so you can talk to him privately also" (*id.* at 6) — advice Van Patten understood to mean that "if [he] wanted to talk to [his] attorney, if [he] had any questions, that they would set up a private place for [him] to talk" (Ex. J at 17). Throughout the proceeding, Connell frequently answered questions posed by the trial judge (Ex. H at 3, 4, 5-6, 10, 12, 15-17, 18, 19), including whether Connell could hear Van Patten's answers (*id.* at 12 (Connell answering in the affirmative)), and participated in a free-form discussion at the end of the proceeding (*id.* at 20-22, 24, 25). For his part, Van Patten "hear[d] [Connell] talking on the phone" (Ex. J at 10) and said he did not have any difficulty understanding Connell during the plea hearing (Ex. H at 9). The court accepted and entered Van Patten's no-contest plea (*id.* at 19).

3. Sentencing.

Fifty-five days later — on November 6, 1995 — the circuit court held the sentencing hearing. Connell appeared in person with Van Patten (Ex. I at 1). The prosecutor recited the facts of the crime (*id.* at 7-11) and argued for the maximum term of imprisonment: twenty years for first-degree reckless homicide, and five years for a dangerous-weapon penalty enhancer (*id.* at 14). As he had promised (Ex. J at 11, 24), Connell argued for a ten-year term of imprisonment (Ex. I at 19; Ex. J at 24). The court accepted the prosecutor's recommendation and sentenced Van Patten to twenty-five years in prison (Ex. I at 27).

4. Hearing on Van Patten's plea-withdrawal motion.

Van Patten moved "to withdraw his plea, or in the alternative [for] a sentence modification" (Ex. B at 3; *see also id.* at App. 2). On August 22, 1996, the circuit court held an evidentiary hearing (Ex. J) on Van Patten's motion. Van Patten testified (*id.* at 4-29), as did Connell (*id.* at 30-38) and Thomas W. Johnson (*id.* at 38-41), Van Patten's lawyer in a case pending in another county on the day of the plea and from whom Van Patten had sought pre-plea advice in this case after speaking with Connell on the day of the plea (*id.* at 9-10, 38-40).

a. Van Patten's testimony.

At the plea-withdrawal hearing, Van Patten asserted two reasons he entered his no-contest plea: Connell's pre-plea assurances that the trial judge would accept Connell's recommendation of a ten-year prison sentence (Ex. J at 11), and Connell's physical absence from the plea

hearing (*id.* at 13). Van Patten elaborated by testifying about pre-plea coercion, intimidation, and promises by Connell. Van Patten testified that "I was forced to take a plea bargain. . . . Every time Mr. Connell would see me, he was telling me Mr. Bruno said if I[ ]didn't take his plea bargain he'[d] make sure I would die in prison" (*id.* at 9; *see also id.* at 21 ("always forced"), 22 ("no choice" about what to say at plea hearing), 48 ("forced all the way")). Van Patten said his lawyer's warnings caused him to forgo telling the court about not wanting to enter a no-contest plea: "Mr. Connell told me that if I told the Court that I wasn't satisfied with what he was doing for me, and if I told the Judge how I was being threatened . . . , that the Judge would get mad and he wouldn't allow any lesser included offenses into the trial" (*id.* at 13; *see also id.* at 23 ("not allowed" by Connell to express reservations about plea)). Van Patten said he did not ask to speak privately with Connell "[b]ecause I was forced not to say anything. I was told not to say anything, just answer the questions that I was told" (*id.* at 17). Van Patten said Connell told him that he "would ask for ten years," that "I would probably only do four or five years," and that "he was friends with the judge, . . . and that most likely the judge would go his way" (*id.* at 10-11; *see also id.* at 26).

b. Defense counsel's testimony.

Defense counsel James Connell, a criminal-defense lawyer for twenty-two years (*id.* at 30), unequivocally denied forcing a plea on Van Patten (*id.* at 31). He denied that Van Patten had always wanted a jury trial and never wanted a plea (*id.* at 34). Connell said he and Van Patten discussed lesser-included offenses and possible plea agreements over many months (*id.* at 33-34) and that Van Patten had authorized him to talk with the prosecutor about those possibilities (*id.* at 33-34), but "[w]e weren't able to reach an agreement until shortly be-

fore the trial" (*id.* at 33). Connell said his telephonic participation at the plea hearing occurred because of both his scheduling conflict "and the fact that everyone wanted to get this matter concluded," in part so numerous "witnesses could be called off" (*id.* at 36). Connell said he did not recall the prosecutor declari .g he would ensure Van Patten died in prison if he did not take the plea offer (*id.* at 37).

c. Wisconsin trial court's ruling.

During arguments, Van Patten's lawyer did not cite *Strickland*, 466 U.S. 668; *Cronic*, 466 U.S. 648; *Hill*, 474 U.S. 52; *Bell v. Cone*, 535 U.S. 685 (2002), or any other case law (Ex. J at 41-43). The prosecutor referred the circuit court to *Strickland*'s standards (*id.* at 47).

In an oral ruling (*id.* at 49-52, App. A47-50), the Wisconsin circuit court denied Van Patten's plea-withdrawal motion (App. A50). The court regarded Van Patten's complaint as rooted in buyer's remorse, not ineffective assistance of counsel or lack of understanding (App. A48-50). In light of Van Patten's extensive testimony about Connell's alleged pre-plea intimidation and promises, the court also regarded as inherently contradictory Van Patten's complaint about Connell's telephonic representation: "[I]f his argument is that he was forced by his attorney to do this, an attorney on the phone is certainly less intimidating than one standing right next to him. So that's not consistent at all with what he is trying to tell the Court here. If he thought this attorney was forcing him to do it, it certainly would be easier to say, 'Well, the guy is on the phone, but, Judge, he's making me do it'" (App. A49).

5. Decision of the Wisconsin Court of Appeals.

The Wisconsin Court of Appeals affirmed, finding that the "plea hearing transcript neither indicates any deficiency in the plea colloquy, nor suggests that Van Patten's attorney's participation by telephone interfered in any way with his ability to communicate with his attorney about his plea" (App. A44). The court observed that the trial "court gave Van Patten the opportunity to speak privately with his attorney over the phone if he had questions about the plea, but Van Patten declined" (App. A44). Citing *Hill* as the basis for relying on *Strickland*, the court rejected Van Patten's ineffective-assistance claim and affirmed the judgment of conviction: "We have reviewed the record with due deference to the trial court's findings, and find nothing to support Van Patten's allegation that counsel forced him to plead no contest. The record does not support, nor does Van Patten's appellate brief include, any argument that counsel's performance was deficient or prejudicial" (App. A46).

6. Decision of the Wisconsin Supreme Court.

The Wisconsin Supreme Court denied Van Patten's petition for review. *State v. Van Patten*, 576 N.W.2d 280 (Wis. 1997) (table) (Ex. G). In the petition for review (Ex. E), Van Patten asserted that his trial lawyer's telephonic assistance violated his Sixth Amendment right to counsel, but he did not cite any federal or Wisconsin case law.

B. Federal Habeas Corpus Proceedings.

Van Patten filed a petition under 28 U.S.C. § 2254 for a writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin.

1. Decision of the United States District Court.

The district judge adopted the magistrate judge's recommendation (App. A40) and denied the petition (App. A29, A30). In the recommendation, the magistrate judge noted that "[t]he transcript of the plea proceeding indicates that Attorney Connell took an active part in the plea proceeding" (App. A38). Like the Wisconsin trial judge, the magistrate judge regarded the ineffective-assistance claim as contradictory (App. A36): "According to Van Patten, Connell's appearance by telephone was enough to intimidate him, but not enough to provide meaningful assistance" (App. A36).

Nonetheless, the magistrate judge declared that Connell's telephonic assistance "was effective under Strickland, but ineffective under Cronic" (App. A34). The magistrate judge then found the *Cronic* violation harmless "even though it was a violation of Van Patten's Sixth Amendment right to the effective assistance of counsel" (App. A34). The district judge concurred (App. A28).

2. Decision of the Seventh Circuit.

The Seventh Circuit reversed the district court's order and granted Van Patten the habeas relief he sought (App. A1-14). Even though this Court has never established that telephonic assistance at a plea hearing either qualifies as deficient performance or results in prejudice to a defendant, the Seventh Circuit held that the Wisconsin

Court of Appeals' decision required granting Van Patten relief under the AEDPA.

According to the Seventh Circuit, the Wisconsin appellate court rendered a decision "contrary to" clearly established federal law because the court "set[ ] forth the wrong legal framework" when it chose *Strickland* rather than *Cronic* as the applicable precedent (App. A6 n.2). Acknowledging the lack of any factual similarity between Van Patten's circumstances and those underlying *Cronic*, the Seventh Circuit held that the Wisconsin appellate court adopted this erroneous framework by failing to recognize that continuous telephonic assistance of counsel at a plea hearing and an actual or functional denial of counsel at a plea hearing "'may be regarded as "materially indistinguishable"'" from one another "'because their legal implications are clearly the same, notwithstanding that the facts themselves are significantly different'" (App. A6 n.2 (quoted source omitted)).

The Seventh Circuit reached this conclusion by first reconfiguring Van Patten's claim as "not a complaint about his attorney's effectiveness" but as a complaint about "a structural defect in the proceedings" (App. A8-9), with the structural defect consisting of "the physical absence of counsel from a hearing where a defendant gives up his most valuable constitutional rights and admits his guilt to a serious charge" (App. A13). Thus, according to the Seventh Circuit, because *Cronic* deals with structural defects, the Wisconsin appellate court had an obligation to extend *Cronic* to Van Patten's case instead of relying on *Strickland*.

In reaching its conclusion that Van Patten was, in effect, denied counsel altogether at his plea hearing, the Seventh Circuit repudiated both the Wisconsin trial court's factual finding that Van Patten would have entered his plea even if Connell had stood next to him in court (App. A48-50) and the undisputed fact (recognized by the Wisconsin Court of Appeals (App. A44)) that had

Van Patten wanted to confer with Connell in private, he could have done so (Ex. J at 17). The Seventh Circuit decided instead that Van Patten would *not* have entered his plea if Connell had appeared in person (App. A3) and that Van Patten was unable to confer with Connell privately (App. A8-A9.)

The Seventh Circuit entered judgment in Van Patten's favor (App. A15-16) and later denied a petition for rehearing and rehearing *en banc* (App. A17).

REASONS FOR GRANTING THE PETITION

The Seventh Circuit exceeded its authority under 28 U.S.C. § 2254(d) and (e)(1) when it granted habeas corpus relief in this case. The court granted habeas relief because, in its view, the Wisconsin Court of Appeals "arrived at a decision contrary to the Supreme Court's precedent when it analyzed the case under *Strickland*" (App. A8-9). Under the AEDPA, however, mere disagreement with a State court's decision does not justify granting habeas relief. The "contrary to" component of 28 U.S.C. § 2254(d) authorizes habeas relief under only one condition: where the State court's adjudication of the habeas applicant's claim "resulted in a decision that was contrary to . . . *clearly established* Federal law, as determined by [this] Court" (emphasis added).

Neither *Strickland* nor *Cronic* clearly establishes that a Sixth Amendment violation occurs when defense counsel provides a defendant with assistance via speakerphone at a plea hearing. *Hill*, on the other hand, clearly establishes that a court reviewing a claim of ineffective assistance at a plea hearing must apply *Strickland*'s two-part test. Consequently, when the Wisconsin Court of Appeals reviewed Van Patten's ineffective-assistance claim under *Strickland*, the court's adjudication resulted in a decision consistent with, *not* contrary to, "clearly established Federal law, as determined by [this] Court."

Under the AEDPA, the Seventh Circuit could not properly find that decision "contrary to . . . clearly established Federal law."

In addition, the Seventh Circuit granted habeas relief based on factual determinations contrary to those found by the Wisconsin trial court and on debatable inferences and assumptions unsupported by the record developed in the Wisconsin trial court. Under 28 U.S.C. § 2254(e)(1), however, a federal habeas court must presume the correctness of "a determination of a factual issue made by a State court" unless the habeas applicant "rebut[s] the presumption of correctness by clear and convincing evidence." Here, Van Patten never challenged the correctness of the Wisconsin trial court's determination of any factual issue. Moreover, under *Rice v. Collins*, 126 S. Ct. 969, 976 (2006), a federal court's "use [of] a set of debatable inferences to set aside the [factual] conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." By relying on facts contrary to those found by the Wisconsin trial court, whether explicitly or by necessary implication, and by "us[ing] . . . debatable inferences" as bases for granting habeas relief, the Seventh Circuit far exceeded its authority under the AEDPA.

I. THE SEVENTH CIRCUIT EXCEEDED THE CONGRESSIONALLY IMPOSED LIMITS IN 28 U.S.C. § 2254(d) WHEN IT GRANTED HABEAS RELIEF BASED ON ITS VIEW THAT THE WISCONSIN COURT OF APPEALS' ADJUDICATION "RESULTED IN A DECISION THAT WAS CONTRARY TO . . . CLEARLY ESTABLISHED FEDERAL LAW."

A. This Court Has Not "Clearly Established" That A *Per Se* Violation Of The Sixth Amendment Occurs When Defense Counsel Provides Assistance Via Speakerphone At A Plea Proceeding.

This Court has not clearly established that telephonic assistance of counsel at a plea hearing qualifies as deficient performance or, if it does, as a presumptively prejudicial deficiency. The Seventh Circuit concedes that this Court has not addressed circumstances like those in this case (App. A1 (describing the question presented in this case as "novel")). Moreover, although this Court identified in *Cronic* three circumstances that create prejudice *per se* and thus excuse a defendant from the obligation of proving prejudice under the second part of the two-part *Strickland* test, none of those three *Cronic* exceptions clearly applies to Van Patten's circumstances. Without a clear statement from this Court, the Seventh Circuit lacked authority under the AEDPA to grant habeas relief here, and the court should not have done so. *Kane v. Garcia Espitia*, 126 S. Ct. 407, 408 (2005) (per curiam) (*Faretta v. California*, 422 U.S. 806 (1975), which clearly establishes a criminal defendant's right to self-representation but "says nothing" about *pro se* defendant's pretrial access to law library, does not "clearly es-

tablish[ ]" the "right of the pro se defendant to have access to a law library").

In *Cronic*, 466 U.S. 648 (1984), this Court identified three categories of errors or impediments that create *per se* prejudice. First, and "[m]ost obvious, of course, is the complete denial of counsel." *Id.* at 659. Second, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* Third, "[c]ircumstances . . . may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-60. This Court illustrated this category by reviewing the egregious trial conditions in *Powell v. Alabama*, 287 U.S. 45 (1932). For the other categories, the Court's examples of structural defects consisted entirely of conduct or circumstances that irredeemably contaminated the adversarial testing of the case against the defendant. *See also Cone*, 535 U.S. at 695-96 (recapitulating *Cronic*'s three categories).

The Seventh Circuit appears to rest its grant of habeas relief on either the first category (complete denial of counsel) or third category (circumstantial denial of counsel); the second category cannot sensibly apply to a nonadversarial proceeding like a plea hearing. *Cronic*, however, "says nothing" — even by implication — about whether a lawyer who provides assistance by speakerphone at a nonadversarial proceeding equates with no lawyer at all ("complete denial of counsel"). Likewise, *Cronic* "says nothing" — even by implication — about whether providing assistance by speakerphone at a nonadversarial proceeding makes the likelihood of "effec-

tive assistance . . . so small that a presumption of prejudice is appropriate."

Perhaps a court addressing the issue *de novo* in a direct appeal might agree with the Seventh Circuit that a *Cronic* exception arises from assistance of counsel via speakerphone. But within the context of the AEDPA, this Court has not clearly established that speakerphone assistance of counsel fits within a *Cronic* exception. Without that clear direction from the Court, the Seventh Circuit exceeded its authority under the AEDPA when it granted habeas relief to Van Patten. *See Lockyer v. Andrade*, 538 U.S. 63, 72-74 (2003) (reversing federal court of appeals and holding State court's decision not "contrary to . . . clearly established Federal law" where State court could reasonably choose from more than one applicable Supreme Court decision and chose one different from the one preferred by the federal court of appeals).

More fundamentally, this Court has not even clearly established that *Cronic* applies at all in the context of a guilty or no-contest plea. *Hill*, 474 U.S. 52, clearly establishes that the two-part *Strickland* test applies to claims grounded in ineffective assistance at a plea hearing. Further, *Hill* clearly defines the specific prejudice a defendant must prove in order to satisfy the *Strickland* test. If anything, *Hill* precludes relieving a defendant of the obligation to prove prejudice when claiming ineffective assistance at a plea hearing and therefore points toward the inapplicability of *Cronic* to that class of ineffective-assistance claims. And none of this Court's other decisions clearly establishes the applicability of *Cronic* to a claim of ineffective assistance at a plea hearing, either.

Indeed, the factors that led this Court in *Cronic* to find prejudice *per se* do not exist in a plea hearing, buttressing the view that *Strickland* rather than *Cronic* provides the "clearly established Federal law" applicable to this case. In *Cronic*, this Court reiterated a basic point about the Sixth Amendment right to counsel: "[T]he right

to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *Absent some effect of challenged conduct on the reliability of the trial process*, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658 (emphasis added). "Thus, 'the core purpose of the counsel guarantee [is] to assure "Assistance" at trial, when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" *Id.* at 654. "The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose," *id.* at 655 — "'to assure fairness in the *adversary* criminal process,'" *id.* at 656 (emphasis added). *See also id.* ("[t]he right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive *the crucible of meaningful adversarial testing*" (emphasis added)).

In *Cronic*, this Court identified three categories of errors or impediments that create "an actual breakdown of the adversarial process," *id.* at 657, and "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," *id.* at 658. *See id.* at 659-60 (identifying and explaining the three categories). The Court found all these defects inherently prejudicial because they lead inevitably to an unacceptable reduction in the reliability of the adversarial-testing process itself.

The tight link between adversarial testing and the reliability of the trial process highlights a fundamental AEDPA-related flaw in the Seventh Circuit's decision: the erroneous mapping of *Cronic*'s trial-focused structural defects to errors or circumstances in a plea hearing. A structural defect within *Cronic*'s scope subverts the core adversarial-testing purpose of assistance of counsel in a trial and produces a presumptively unreliable result. A plea hearing, however, divorces adversarial testing from

reliability. At a plea hearing, defense counsel does not cross-examine the State's witnesses or challenge other evidence offered by the State. Nor does defense counsel challenge the State's case by presenting testimony or other evidence supporting the defendant's case. Rather, adversarial testing occurs before the plea hearing when defense counsel ponders both the prosecutor's case and the defendant's countervailing case, when the defendant and defense counsel together evaluate the State's case as they balance the risks and benefits of going to trial against the risks and benefits of tendering a plea, and when the prosecutor and defense counsel negotiate the terms of a plea. The reliability of the determination of the defendant's guilt thus turns not on adversarial testing at the plea hearing but on the trial judge's assessment of the voluntary and intelligent character of the defendant's decision to waive adversarial testing, an assessment of "'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill*, 474 U.S. at 56. In a plea hearing, voluntary and intelligent choice rather than adversarial testing yields reliability.

Moreover, the impact of a structural defect during adversarial-testing phases of a criminal proceeding differs substantially from the effect of attorney errors in a plea hearing. A structural defect in a trial ripples throughout a complex proceeding and affects an array of participants — judge, jurors, witnesses, defendant, prosecutor — in ways unknown and unknowable, creating substantial uncertainty about the reliability of the trial's result. In a plea hearing, however, an error or defect affects one person — the defendant — and potentially affects that person in a specific, knowable way. Through the testimony of the defendant and defense counsel, a trial court can readily assess the impact of that defect on the reliability of the plea-hearing process and, therefore, on the reliability of the result of the plea hearing.

At this point, this Court has not clearly established under what circumstances a *per se* prejudicial structural defect could arise in a plea hearing, and this Court has certainly never clearly established that ongoing assistance by counsel via speakerphone rather than in person at a plea hearing even amounts to error, much less to a structural defect justifying a finding of prejudice *per se*. Further, in light of *Hill* and in light of the mismatch between the adversarial-testing factors that inform *Cronic* and the lack of adversarial-testing factors in a plea hearing, the Seventh Circuit could not, consistent with the AEDPA, hold that the Wisconsin Court of Appeals' reliance on *Strickland* contravened "clearly established Federal law."

B. The Wisconsin Court Of Appeals' Adjudication Of Van Patten's Ineffective-Assistance Claim Did Not "Result[ ] In A Decision That Was Contrary To ... Clearly Established Federal Law" Within The Meaning Of The AEDPA.

This Court has held that a State court's adjudication of the merits of a habeas applicant's claim "result[s] in a decision ... contrary to ... clearly established Federal law" when the State court either "applies a rule that contradicts the governing law set forth in [this Court's] cases," *Williams v. Taylor*, 529 U.S. 362, 405 (2000), or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent," *id.* at 406. For many of the reasons set forth in Part I.A. (pp. 15-20, above), the Wisconsin Court of Appeals did not commit either error.

This Court has not confronted a case containing facts "materially indistinguishable" from those in this case.

The Seventh Circuit acknowledged as much, describing this case as "novel" (App. A1). Consequently, to qualify as a decision "contrary to . . . clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d), the Wisconsin Court of Appeals' decision must have "applie[d] a rule that contradicts the governing law set forth in [this Court's] cases." Under this test, "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003). To fit a State court's decision within the boundaries of "contrary to . . . clearly established Federal law" under the AEDPA, a federal habeas court would have to classify the decision "as 'diametrically different' from, 'opposite in character or nature' from, or 'mutually opposed' to . . . [this Court's] clearly established precedent." *Williams*, 529 U.S. at 406. *See also id.* at 405 (adopting dictionary definition of "contrary"). If the State court's decision "does not conflict with the reasoning or the holdings of [the Court's] precedent, it is not 'contrary to . . . clearly established Federal law.'" *Esparza*, 540 U.S. at 17.

Not only was the Wisconsin Court of Appeals' decision not "opposite in character or nature" from this Court's decisions, it was perfectly consistent with them. Relying on *Hill*, the Wisconsin Court of Appeals cited and applied *Strickland* (A45 & n.3) and found that defense counsel's participation via speakerphone had not injured Van Patten in any way. The court's implicit conclusion that none of the *Cronic* exceptions applied is eminently supportable. Nothing in the record showed counsel's conduct was unworkable and detrimental in this case, let alone so problematic it should be deemed equivalent to having no counsel and therefore *per se* ineffective and prejudicial.

The Seventh Circuit found "structural defects" in the plea proceedings on the grounds that the Wisconsin trial court failed to make "advance arrangements . . . for a private line in a private place" (App. A8) and that private

communications between Van Patten and his lawyer "would have required a special request by Van Patten and, apparently, a break in the proceedings" (App. A8). Neither of those circumstances — individually, together, or in combination with other circumstances — justifies finding any error, much less error meriting habeas relief.

A structural defect related to private communications cannot arise when the trial court says it will effect private communication and the defendant understands the court will do so. Facilitating private consultation cannot qualify as error, much less a structural defect. Likewise, the lament that private communications between Van Patten and his lawyer "would have required a special request by Van Patten and, apparently, a break in the proceedings" (App. A8) does not describe a "structural defect" or even distinguish a defendant receiving telephonic assistance from a defendant receiving in-person assistance. Whether assisted by telephone or in person, a defendant who has doubts about his plea decision and wants to discuss it with counsel bears the responsibility for advising counsel or the court (or both) of the need for private consultation. The request, identical in either instance, does not become "special" merely because counsel provides advice by telephone rather than in person. And regardless of whether counsel provides assistance by speakerphone or in person, a private consultation can result in a break in the proceedings. None of this Court's decisions even hints that a break in criminal proceedings to accommodate a defendant's request for private consultation somehow creates a prejudicial structural defect.

The point, of course, is not that the Wisconsin Court of Appeals was necessarily correct. But the strength of its reasoning and the weakness in the Seventh Circuit's confirm the Wisconsin court's ruling as not "opposite in character or nature" from *Cronic*. Consequently, the Wisconsin court's rejection of *Cronic* also did not "result[ ] in a

decision . . . contrary to . . . clearly established Federal law."

Finally, the Seventh Circuit criticized the Wisconsin Court of Appeals for "never even acknowledg[ing] *Cronic*" (App. A8). In light of *Hill*'s unambiguous declaration that *Strickland* applies to claims of ineffective assistance at a plea hearing, it is difficult to fault the Wisconsin court for not citing *Cronic*. In any event, the Wisconsin court's noncitation of *Cronic* does not bring the decision within the ambit of the AEDPA's "contrary to" criterion. As this Court has clearly and repeatedly held, "A state court's decision is not 'contrary to . . . clearly established Federal law' simply because the court did not cite our opinions. We have held that a state court need not even be aware of our precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'" *Esparza*, 540 U.S. at 16 (quoting *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)).[3]

II. By Relying On Facts Contrary To Those Found By The Wisconsin Trial Court And On Facts Resting On A Set Of Debatable Inferences, The Seventh Circuit Violated The Congressionally Imposed Limits Found In 28 U.S.C. § 2254(e)(1).

The Seventh Circuit devotes much of its decision to a recitation of facts and circumstances that, in the court's view, should have led the Wisconsin Court of Appeals to apply *Cronic* instead of *Strickland*. The Seventh Circuit's

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[3] For the foregoing reasons, the Wisconsin Court of Appeals' decision also did not "involve[ ] an unreasonable application of clearly established Federal law" or unreasonably fail to extend existing precedent.

recitation, however, reveals repeated failures to adhere to the limitations found in 28 U.S.C. § 2254(e)(1).

To find *Cronic* rather than *Strickland* applicable, the Seventh Circuit recognized that it had to construe Van Patten's circumstances as akin to those to which *Cronic* would apply. The court explained how it would determine whether to apply *Cronic*: "In deciding whether to dispense with the two-part *Strickland* inquiry, a court must evaluate whether the 'surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel,' *Cronic*, 466 U.S. at 666, and thus 'justify a presumption that [the] conviction was insufficiently reliable to satisfy the Constitution,' *id.* at 662" (App. A7-8).

The Seventh Circuit answered those questions in the affirmative based on its conclusion that "the arrangements made it impossible for Van Patten to have the 'assistance of counsel' in anything but the most perfunctory sense," and thus amounted to "a structural defect in the proceedings against him" (App. A8-9). In reaching that conclusion, the court ignored both its obligation under 28 U.S.C. § 2254(e)(1) to accept as correct the Wisconsin trial judge's determinations of factual issues and its obligation under *Collins*, 126 S. Ct. at 976, not to use "a set of debatable inferences" to undermine a State court's factual determinations.

The Seventh Circuit's fundamentally flawed construction began with its summary of the proceedings in the State trial court (App. A2-3). The court summarized Van Patten's testimony, including Van Patten's claim "that he would not have entered his plea if his attorney had been present at the hearing" (App. A3). The Seventh Circuit then noted that "[t]he court denied Van Patten's postconviction motion" (App. A3).

The Wisconsin trial judge, however, in rejecting Van Patten's testimony as not credible, determined that defense counsel did not threaten, coerce or otherwise bully

Van Patten into tendering his no-contest plea and that Van Patten would have entered his plea even if his lawyer had stood next to him during the plea hearing.

Consequently, when the Seventh Circuit wrote that "we cannot know what Van Patten might have done had he been treated like any other defendant with counsel at his side" (App. A9), the court repudiated without warrant the Wisconsin trial judge's factual determination, based on testimony from Van Patten and his lawyer, of not only what Van Patten might have done, but what Van Patten certainly would have done: he would have entered the same plea even if defense counsel had stood shoulder to shoulder with him.

By accrediting the claim that Van Patten would not have tendered his plea if his lawyer had provided assistance in person rather than by speakerphone, the Seventh Circuit flouted the AEDPA's requirement that federal habeas courts must presume the correctness of a State court's factual determinations unless the habeas applicant successfully rebuts the presumption. Van Patten never challenged the correctness of the Wisconsin trial judge's factual determinations.

The Seventh Circuit's deviation from AEDPA standards continued in the opinion's analysis of the circumstances described as "all the ways [Van Patten] was foreclosed from receiving an attorney's guidance and support at his hearing," leaving him with only "perfunctory" assistance of counsel (App. A8). Addressing a circumstance the Seventh Circuit regarded as creating a structural defect, the court wrote: "If Van Patten wished to converse with his attorney, anyone else in the courtroom could effectively eavesdrop. (We assume the district attorney would balk if he were expected to conduct last-minute consultations with his staff via speakerphone in open court, 'on the record,' with the defendant taking in every word.)" (App. A8.) This characterization, however, directly contradicts Van Patten's own understanding of the

circumstances at the plea hearing: during his testimony at the plea-withdrawal hearing, Van Patten concurred that the trial judge had advised that "if [he] wanted to talk to [his] attorney, if [he] had any questions, that they would set up a private place for [him] to talk" (Ex. J at 17). Without any support in the record, the Seventh Circuit's "fact" does not even rise to the level of a fact based on "a set of debatable inferences," *Collins*, 126 S. Ct. at 976.

The Seventh Circuit's grant of habeas relief also improperly rested on "a set of debatable inferences," *id.*, about the effect of technology on an attorney's assistance (App. A11-12). As the court's assessment makes clear, the Seventh Circuit does not trust defense attorneys to do their jobs competently and professionally unless "the [trial] court can keep an eye on [them]" (App. A11). The Seventh Circuit's assessment violates *Strickland*'s "clearly established" and frequently reiterated requirement that courts reviewing ineffective-assistance claims presume that counsel provide competent and professional assistance. The plea hearing in this case highlights both the significant departure of the Seventh Circuit from *Strickland*'s presumption of competence and the dubious character of the court's inferences: as the magistrate judge observed in the recommendation adopted by the district judge, "The transcript of the plea proceeding indicates that [defense counsel] took an active part in the plea proceeding" (App. A38).

The Seventh Circuit complemented its failure to abide by the AEDPA's standards, *Strickland*'s presumption of competence, and *Collins*'s restriction on "debatable inferences" when the court painted Van Patten as a defendant bereft and adrift at the plea hearing: "Van Patten stood alone before judge and prosecutor. Unlike the usual defendant in a criminal case, he could not turn to his lawyer for private legal advice, to clear up misunderstandings, to seek reassurance, or to discuss any last-minute misgiv-

ings. Listening over an audio connection, counsel could not detect and respond to cues from his client's demeanor that might have indicated he did not understand certain aspects of the proceeding, or that he was changing his mind" (App. A8).

This portrait contains a gaping hole, all but indiscernible from the court's opinion but obvious from the plea-withdrawal transcript and the Wisconsin trial judge's oral ruling on Van Patten's claim of ineffective assistance: the irreconcilable conflict between (on one hand) the contention by Van Patten that he would not have entered his plea if his lawyer had assisted him in person rather than by speakerphone and (on the other hand) his repeated assertions that he pleaded because his lawyer made threats and promises before the hearing and forced him to conceal from the trial judge his alleged reservations about the plea. This inherent conflict led the Wisconsin trial judge to find as a fact that Van Patten would not have done anything differently if his lawyer had appeared in court — that in light of Van Patten's claims of coercion by counsel, the physical absence of defense counsel afforded Van Patten greater freedom to refuse to tender his plea than he would have possessed had counsel stood next to him. (App. A49.)

A federal habeas court cannot grant habeas relief based on factual findings it made in violation of 28 U.S.C. § 2254(e)(1). Despite the strict limits Congress embedded in section 2254(e)(1), the Seventh Circuit nonetheless found *per se* prejudice — equating continuous telephonic assistance of counsel at a plea hearing with the actual or functional denial of any counsel at all — by discarding the Wisconsin state courts' findings of facts and by relying on "debatable inferences." The Seventh Circuit's failure to abide by those congressionally imposed limits led to a fundamental violation of the AEDPA.

The Seventh Circuit's recurring disregard for the AEDPA standards for granting habeas relief requires this

Court's supervision. The Seventh Circuit rested its rejection of *Strickland* and its application of *Cronic* on facts contrary to those found by the Wisconsin trial judge; on "set[s] of debatable inferences"; on circumstances that neither amount to error nor create any legal or practical distinction between assistance of counsel provided by speakerphone and assistance provided in person; and on the glaring omission of a circumstance critical to determining whether a prejudicial "structural defect" even existed. Thus, this decision so far departs from the acceptable and usual course of federal habeas proceedings under the AEDPA as to require an exercise of this Court's supervisory power.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Date: May 30, 2006

Respectfully submitted,

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APPENDIX

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Van Patten v. Deppisch, 434 F.3d 1038
(7th Cir. 2006)

In the
United States Court of Appeals
for the Seventh Circuit

No. 04-1276

JOSEPH VAN PATTEN,

Petitioner-Appellant,

v.

JODINE DEPPISCH,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 98 CV 1014—**Rudolph T. Randa**, *Chief Judge.*

ARGUED SEPTEMBER 21, 2005—DECIDED JANUARY 24, 2006

Before COFFEY, EVANS, and WILLIAMS, *Circuit Judges.*

EVANS, *Circuit Judge.* Telephone conversations with clients are a big part of what lawyers do. But can using a telephone while representing a client go too far? This habeas case presents the novel — but, in the endless quest for efficiency, perhaps inevitable — question: What does the law require when a client on the other end of a telephone hookup with his lawyer is standing before a judge,

about to relinquish a bevy of important constitutional rights?

Joseph Van Patten was charged with one count of first degree intentional homicide following a fatal shooting in Shawano County, Wisconsin. One day in September 1995, while he was in jail awaiting trial, Van Patten got a call from his attorney, James B. Connell. Connell informed Van Patten that he would shortly be transported to court for a change of plea hearing. Under an oral agreement Connell had reached with the prosecutor, Van Patten was to enter a plea of no contest to a charge of first degree reckless homicide, with a penalty enhancement for committing the offense while using a dangerous weapon. (Van Patten would later testify that he had some questions about the arrangement which he had been unable to raise in the phone call with Connell.)

At the court hearing later that day, Connell "appeared" via speakerphone. Apparently this was due not to any last-minute problem, but simply for the convenience of everyone's schedules. Connell would later explain that he had appearances in two other counties that day; that the court was holding time for Van Patten's trial; that witnesses were waiting to know whether they would be needed; and that "everyone wanted to get this matter concluded." No one asked Van Patten whether he objected to his attorney's absence from the hearing, or whether he would prefer to reschedule the hearing to a time when his attorney could appear in person.

As the participants huddled around a speakerphone on the judge's bench, the judge encouraged Van Patten to "take all the time you need to confer with your attorney, and we can perhaps get him on the line in a private place so you could talk to him privately also." The judge then informed Van Patten that "[e]verything here is going to be on the record." The court quizzed Van Patten to be

sure he understood what was happening at the hearing, including the constitutional guarantees — his rights to a speedy and public trial, to trial by jury, to confront accusers, to compel witnesses, and to not serve as a witness against himself — he was about to forfeit by pleading no contest. Van Patten's only extended comments related to whether he would be allowed a visit in jail from his daughter. Satisfied that everything was in order, the judge accepted the plea. Two months later, Van Patten was sentenced to a maximum term of 25 years in prison.

After retaining different counsel, Van Patten moved to withdraw his plea, arguing that Connell's failure to appear in person at the change of plea hearing violated his Sixth Amendment right to counsel. At the hearing on that motion, Van Patten testified that he had wanted a jury trial but felt "forced" to enter a no-contest plea because Connell told him if he didn't, the prosecutor would "make sure I would die in prison." Asked whether at any point during the hearing he asked to speak to his attorney on a private line, Van Patten said no, because Connell told him to "just say yes and just go along with everything." Van Patten testified that he would not have entered his plea if his attorney had been present at the hearing. The court denied Van Patten's postconviction motion. Claiming that he was denied his right to the assistance of counsel, Van Patten embarked on an odyssey of appellate proceedings.

The Wisconsin Court of Appeals analyzed Van Patten's Sixth Amendment claim as a complaint of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must show that his counsel's performance fell below an objective standard of reasonableness. *Id.* at 688. The court's review of the attorney's performance must be "highly deferential [,] . . . indulg[ing] a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance." *Id.* at 689. Under *Strickland's* second prong, the defendant also bears the burden of showing prejudice — that is, a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. The state appellate court said its review of the plea hearing transcript "neither indicates any deficiency in the plea colloquy, nor suggests that Van Patten's attorney's participation by telephone interfered in any way with his ability to communicate with his attorney about his plea." Accordingly, the appellate court rejected Van Patten's right-to-counsel claim.[1] The Wisconsin Supreme Court denied further review.

Van Patten then brought his Sixth Amendment claim to the district court as a habeas petition under 28 U.S.C. § 2254. In his recommendation to the district court, the magistrate judge found that Connell's telephonic appearance at the plea hearing had been "effective under *Strickland*," but "ineffective" under *United States v. Cronic*, 466 U.S. 648 (1984).

Cronic, which was decided on the same day as *Strickland*, recognizes several circumstances where the two-pronged *Strickland* test does not apply, circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. *Cronic*, not *Strickland*, applies where there has been a "complete denial of counsel"; where counsel has been "prevented from assisting the accused during a critical stage" of the prosecution; where "counsel entirely fails to subject the prosecution's case to meaningful ad-

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[1] The state appellate court did acknowledge that Connell's appearance by telephone violated Wis. Stat. § 967.08, which authorizes some proceedings to be conducted by phone but does not permit an attorney to appear by phone at a plea hearing. But the court said this "procedural" violation was "harmless error."

versarial testing"; or under circumstances where "although counsel is available . . . the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the [proceeding]." *Id.* at 659-60 and 659 n.25. *See also Hollenback v. United States*, 987 F.2d 1272, 1275 (7th Cir. 1993) (recognizing *Cronic* as an "exception" to *Strickland*'s two-part test). A *Cronic* violation can occur where the denial of assistance of counsel was either "[a]ctual or constructive." *Strickland*, 466 U.S. at 692. *See also Siverson v. O'Leary*, 764 F.2d 1208, 1217 (7th Cir. 1985). Although he identified *Cronic* as the law governing Van Patten's habeas petition, the magistrate judge believed — and recommended to the district judge (incorrectly, as we will explain) — that the violation could be considered "harmless error."

Acting on the recommendation, the district court made two holdings that are difficult to reconcile. It endorsed the magistrate judge's analysis that counsel's failure to appear in person, albeit "harmless error," was "a violation of Van Patten's Sixth Amendment right to effective assistance of counsel" under *Cronic*. But the district court also concluded that the state appellate court had "properly identified and applied *Strickland*," rather than *Cronic*, as the appropriate legal framework. (Under *Strickland*, it seems clear Van Patten would have no viable claim.)

Thus, we must resolve two questions: Did the state court err in applying *Strickland*, rather than *Cronic*, when it decided Van Patten's Sixth Amendment claim? If the state court did apply the wrong law and Van Patten was denied assistance of counsel under *Cronic*, did the district court err in applying a harmless-error analysis to defense counsel's failure to appear in person at the plea

hearing? We conclude that the answer to both questions is yes.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may grant habeas relief from a state court conviction if it finds the state court's adjudication of a constitutional claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that of the Supreme Court]." *Williams v. Taylor*, 529 U.S. 362, 405 (2000).[2] We review the district court's decision rejecting

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[2] The state argues that because the Supreme Court has never decided a case involving counsel's participation in a plea hearing by telephone, the state appellate court's application of *Strickland* to this case did not "result[ ] in a decision that was contrary to . . . clearly established federal law," and thus a federal court may not grant habeas relief. This argument misapprehends the AEDPA regime. "Factual contexts of cases may be regarded as 'materially indistinguishable' because their legal implications are clearly the same, notwithstanding that the facts themselves are significantly different." RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 1439 n.24 (4th ed. 2001) (citing *Ramdass v. Angelone*, 530 U.S. 156, 180 (O'Connor, J., concurring)). One of the most obvious ways a state court may render a decision "contrary to" the Supreme Court's precedents is when it sets forth the wrong legal framework. *See Williams*, 529 U.S. at 397-98 (state court's decision was contrary to clearly established law because it mischaracterized the appropriate rule for evaluating defendant's Sixth Amendment claim). Moreover, a state court decision is also an "unreasonable application of" Supreme Court precedent if it "refuses to extend [an established legal]

Van Patten's habeas petition *de novo*. *Searcy v. Jaimet*, 332 F.3d 1081, 1087 (7th Cir. 2003).

The Sixth Amendment's right-to-counsel guarantee recognizes "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Cronic*, 466 U.S. at 654 (citation omitted). Thus, a defendant requires an attorney's "guiding hand" through every stage of the proceedings against him. *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *Cronic*, 466 U.S. at 658. It is well-settled that a court proceeding in which a defendant enters a plea (a guilty plea or, as here, a plea of no contest) is a "critical stage" where an attorney's presence is crucial because "defenses may be . . . irretrievably lost, if not then and there asserted." *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961). *See also White v. Maryland*, 373 U.S. 59, 60 (1963); *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1014 (7th Cir. 1988). Indeed, with plea bargaining the norm and trial the exception, for most criminal defendants a change of plea hearing is *the* critical stage of their prosecution.

In deciding whether to dispense with the two-part *Strickland* inquiry, a court must evaluate whether the "surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel," *Cronic*, 466 U.S. at 666, and thus "justify a presumption that [the] conviction was insufficiently reliable

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principle to a new context where it should apply." *Id.* at 407. Thus, if the state court got its decision wrong because it identified and applied the wrong precedent — as we will explain it did in this case — a federal court may award collateral relief.

to satisfy the Constitution," *id.* at 662. In this case, although the transcript shows that the state trial judge did his best to conduct the plea colloquy with care, the arrangements made it impossible for Van Patten to have the "assistance of counsel" in anything but the most perfunctory sense. Van Patten stood alone before judge and prosecutor. Unlike the usual defendant in a criminal case, he could not turn to his lawyer for private legal advice, to clear up misunderstandings, to seek reassurance, or to discuss any last-minute misgivings. Listening over an audio connection, counsel could not detect and respond to cues from his client's demeanor that might have indicated he did not understand certain aspects of the proceeding, or that he was changing his mind. If Van Patten wished to converse with his attorney, anyone else in the courtroom could effectively eavesdrop. (We assume the district attorney would balk if he were expected to conduct last-minute consultations with his staff via speakerphone in open court, "on the record," with the defendant taking in every word.) No advance arrangements had been made for a private line in a private place, and even if one could "perhaps" have been provided, it would have required a special request by Van Patten and, apparently, a break in the proceedings. In short, this was not an auspicious setting for someone about to waive very valuable constitutional rights.

Considering all the ways he was foreclosed from receiving an attorney's guidance and support at his hearing, it is clear to us that Van Patten's case must be resolved under *Cronic*. Thus, the state appellate court arrived at a decision contrary to the Supreme Court's precedent when it analyzed the case under *Strickland* (indeed, the state court's opinion never even acknowledges *Cronic*), and the district court erred when it endorsed that decision. Properly analyzed, Van Patten's claim is not a complaint about his attorney's effectiveness; rather, it points to a structural defect in the pro-

ceedings against him. When a defendant is denied assistance of counsel at a stage where he must assert or lose certain rights and defenses, the error "pervade[s] the entire proceeding." *Satterwhite v. Texas*, 486 U.S. 249 (1988) (citing *White* and *Hamilton*). *See also Bell v. Cone*, 535 U.S. 685, 695-96 (2002) (a trial is "presumptively unfair . . . where the accused is denied the presence of counsel at 'a critical stage'" which holds "significant consequences for the accused") (citations omitted); *Cronic*, 466 U.S. at 659 (same).

Van Patten does not allege, for example, that his attorney botched his defense through bad legal judgments, or misinformed him of the ramifications of his plea. Rather, the arrangements under which the hearing was conducted, with defendant and counsel unable to see or communicate privately with each other, prevented Van Patten from receiving the assistance that the Sixth Amendment guarantees. However acceptable an attorney's performance may otherwise be by *Strickland* standards, it is beside the point if the attorney is prevented by the design of the proceeding from providing the full benefit of his skills when his client needs them most. Although the record may make the proceeding appear to have been routine and proper, we cannot know what Van Patten might have done had he been treated like any other defendant with counsel at his side. Under such unique circumstances, a plea cannot meet the constitutional requirement that it be intelligent and voluntary. *See Brady v. United States*, 397 U.S. 742, 749 (1970) (voluntariness of a plea "can be determined only by considering all of the relevant circumstances surrounding it"); *White*, 373 U.S. at 60 (when defendant enters a plea outside the presence of counsel, "we do not stop to determine whether prejudice resulted: 'Only the presence of counsel could have enabled [the] accused to know all the defenses available to him and to plead intelligently.'" (quoting *Hamilton*, 368 U.S. at 55)).

Getting the attorney on speakerphone may have been better than nothing. But the Sixth Amendment requires more than "formal compliance" with its guarantees. *Cronic*, 466 U.S. at 654 (citation omitted). *See also Childress v. Johnson*, 103 F.3d 1221, 1231 (5th Cir. 1997) (applying *Cronic* where defense counsel in a plea hearing functioned as little more than "standby counsel"). And so we think it problematic to treat assistance of counsel as a formality to be overcome through creative use of technology so that everyone can keep their calendars in order.

The state argues against applying *Cronic* here because plea hearings do not involve presentation of evidence and, in the state's view, simply formalize bargains previously negotiated by the prosecution and defense. "[D]efense counsel's adversarial-testing role essentially disappears" in a plea hearing, the state reasons in its brief, and thus a telephone appearance is good enough. But the state's conception of counsel's role is too limited.

Defense counsel should be fully engaged at a plea hearing no less than at trial because in both settings, "the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *Cronic*, 466 U.S. at 654 (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)). *See also Childress*, 103 F.3d at 1227 ("A defendant is constitutionally entitled to the *active* assistance of counsel at a plea hearing.") (emphasis added). Defense counsel must also ensure that the prosecutor fully performs his end of whatever deal has been struck. *See Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor . . . such promise must be fulfilled.") By the state's logic, if a plea hearing is merely *pro forma*, the state could be represented as effectively by a clerk or paralegal as by one of its professional prosecutors. But however routine such hearings may

have become, the Supreme Court has not revised its view that entering a guilty plea (or its equivalent, as here, a plea of no contest) is "a grave and solemn act," *Brady*, 397 U.S. at 748, to be treated, like all phases of the criminal process, as a "confrontation between adversaries," *Cronic*, 466 U.S. at 657.

Physical presence is necessary not only so that counsel can keep an eye on the client and the prosecutor, but so the court can keep an eye on counsel. Even if a private line had been arranged for Van Patten to speak with his attorney, we would regard long-distance lawyering in critical-stage proceedings as inadequate to safeguard effective assistance of counsel and the integrity of the judicial process. This point underscores why *Cronic*, not *Strickland*, applies here.

Over a phone line, it would be all too easy for a lawyer to miss something. For example, she might prejudice her client by failing to make some important point during the proceedings and later claim it was a tactical decision (in which case *Strickland* mandates a large benefit of the doubt), when in reality she wasn't paying attention. Or an attorney might realize he had neglected to inform the client of some crucial piece of information but be tempted to let it pass rather than broadcasting the issue to everyone in the room. *Cf. Ivy v. Caspari*, 173 F.3d 1136 (8th Cir. 1999) (defendant's guilty plea was not knowing and voluntary where counsel had failed to provide adequate explanation of elements of offense and other crucial information). On collateral review, courts can rarely assess an attorney's performance from the printed record alone. Even assuming that counsel could hear and understand every word (and how many people who have experienced speakerphones or conference calls would stake their lib-

erty on *that* assumption?),[3] the client or the judge might never know whether the defense attorney was hanging on every word, reading documents in another case, surfing the web, or falling asleep.[4] *Cf. Burdine v. Johnson*, 262 F.3d 336 (5th Cir 2001) (en banc), *cert. denied sub nom. Cockrell v. Burdine*, 535 U.S. 1120 (2002) (under *Cronic*, defendant was denied assistance of counsel when his attorney repeatedly dozed during trial).

Having decided that the circumstances surrounding Van Patten's hearing justify a presumption of prejudice under *Cronic*, we must address the district court's finding that defense counsel's constructive absence was nonetheless harmless error.

In his recommendation, the magistrate judge relied on two decisions, *United States v. Morrison*, 946 F.2d 484, 503 (7th Cir. 1991), and *Siverson v. O'Leary*, 764 F.2d 1208 (7th Cir. 1985), where we said counsel's absence in some circumstances might be presumptively prejudicial yet still be subject to a harmless-error analysis. In *Siverson*, a state habeas case, the defendant's counsel was absent when the jury verdict was returned. In *Morrison*, a lengthy multi-defendant federal drug conspiracy trial, the lawyer for one of the defendants was excused (with his client's permission) from attending three court sessions that did not involve the offering of evidence

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[3] At the plea hearing, the judge instructed the defendant: "Mr. Van Patten, we are going to put your attorney on the speakerphone, so I want you standing up a little closer to make sure he can hear you. I think you will be able to hear him, but sometimes they cannot hear you."

[4] Even if we assume that busy attorneys never do such things during conference calls with their clients, what might we be asked to accept next? Offshore defense-attorney call centers? Letting the defendant confer with counsel via Blackberry?

against the defendant. We viewed these situations as trial errors subject to a harmless-error analysis.

But *Siverson* and *Morrison* also recognized that harmless-error inquiry would not apply where the denial of counsel contaminated the entire proceeding. *See Morrison,* 946 F.2d at 503-04; *Siverson,* 764 F.2d at 1217 n.6. This distinction is underscored by several Supreme Court decisions, which have made clear that while some Sixth Amendment violations are susceptible to harmless-error analysis, *see Arizona v. Fulminante,* 499 U.S. 279, 306-07 (1991) (citing examples), "structural defects" are not, *id.* at 309. *See also Penson v. Ohio,* 488 U.S. 75, 88 (1988) (denial of counsel under the meaning of *Cronic* "can never be considered harmless error"); *Satterwhite,* 486 U.S. at 256-57 (explaining the difference between trial error and "violations that pervade the entire proceeding"); *Patrasso v. Nelson,* 121 F.3d 297, 305 (7th Cir. 1997) (remanding for grant of a habeas petition without harmless-error analysis after finding attorney's performance at defendant's sentencing hearing was "so lacking that it invites application of *Cronic* rather than *Strickland*"). Because the physical absence of counsel from a hearing where a defendant gives up his most valuable constitutional rights and admits his guilt to a serious charge is a structural defect, the district court erred in finding that the error could be analyzed under a harmless standard.

Although counsel-by-conference call probably could not have been imagined by the Supreme Court in 1938, it is worth remembering that Justice Sutherland in *Powell* — as well as Justice Stevens in *Cronic* more than a half-century later — invoked the metaphor of the "guiding hand" of counsel which a defendant requires at every step. Similarly, we have observed that "[t]he Sixth Amendment . . . guarantees more than just a warm body to stand next to the accused." *Thomas,* 856 F.2d at 1015. In this case, Van Patten didn't get even a warm body.

The judgment of the district court is REVERSED and the case is REMANDED for the entry of an order granting the petition for a writ of habeas corpus. On the subsequent remand to the Circuit Court for Shawano County, the proceedings against Mr. Van Patten can resume with a plea of not guilty in place.

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: **January 24, 2006**

BEFORE:
Honorable JOHN L. COFFEY, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge
Honorable ANN CLAIRE WILLIAMS, Circuit Judge

No. 04-1276

JOSEPH L. VAN PATTEN,
Petitioner-Appellant

v.

JODINE DEPPISCH,
Respondent-Appellee

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 98 C 1014, Rudolph T. Randa, Chief Judge

The judgment of the District Court is REVERSED and the case is REMANDED for the entry of an order granting the petition for writ of habeas corpus. On the subsequent remand to the Circuit Court for Shawano County, the proceed-

ings against Mr. Van Patten can resume with a plea of not guilty in place. The above is in accordance with the decision of this court entered on this date.

(1061-110393)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 27, 2006

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*
Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 04-1276

JOSEPH VAN PATTEN, *Petitioner-Appellant,*	Appeal from the United States District Court for the Eastern District of Wisconsin
v.	No. 98 CV 1014
JODINE DEPPISCH, *Respondent-Appellee.*	Rudolph T. Randa, *Chief Judge.*

ORDER

On February 6, 2006, the respondent-appellee filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc.[1] The petitions for rehearing and for rehearing en banc are therefore DENIED.

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[1] The Honorable Joel M. Flaum and the Honorable Diane S. Sykes did not participate in reviewing the en banc petition in this case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOSEPH P. VAN PATTEN,

Petitioner,

-vs- **Case No. 98-C-1014**

THOMAS BORGEN,[1]

Respondent.

DECISION AND ORDER

The petitioner, Joseph P. Van Patten ("Van Patten"), filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On Novem-

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[1] The respondent, Gary R. McCaughtry ("McCaughtry"), filed a motion to substitute Thomas G. Borgen ("Borgen") as the respondent. As grounds, McCaughtry states that although Van Patten resided in his custody when Van Patten filed the petition, he was transferred to Fox Lake Correctional Institution and now resides in that facility under the custody of Borgen.

Rule 2(a) of the Rules Governing Habeas Corpus Cases Under Section 2254 provides that if an applicant "is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent." Borgen is the State of Wisconsin officer who has custody of the petitioner and accordingly, the Court will grant McCaughtry's motion to substitute Borgen as the respondent and has amended the caption to reflect that substitution.

ber 6, 1995, Van Patten was convicted of first degree reckless homicide by the State of Wisconsin Circuit Court for Shawno County, Wisconsin. Van Patten is serving a 25-year sentence. He alleges that he was denied effective assistance of counsel in violation of the Sixth Amendment because his counsel did not appear in person at the plea hearing. Relevant to this action is its convoluted procedural history.

Procedural History

Initially, the matter was randomly assigned to United States Magistrate Judge Aaron E. Goodstein. In July 2000, counsel was appointed to represent Van Patten. Appointed counsel filed a traverse on behalf of Van Patten and expanded the grounds for the petition to include the contention that the violation of Wis. Stat § 967.08 at the plea hearing denied Van Patten his right to due process.

On January 17, 2003, Magistrate Aaron E. Goodstein filed an order denying Van Patten's petition for a writ of habeas corpus and directing that the action be dismissed. That same day, the Clerk of Court entered judgment.

On February 6, 2003, Van Patten filed a notice of appeal. On February 19, 2003, Van Patten filed his own motion for extension of time to file a motion for a certificate of appealability (Docket #33). Thereafter, counsel for Van Patten filed a motion for an extension of time to file a certificate of appealability (Docket # 34).

On March 7, 2003, Magistrate Judge Goodstein entered an order vacating the judgment, converting his January 17, 2003, decision and order to a recommendation and directing the Clerk of Court to transfer the matter to a district court judge. On the same date, Magistrate Judge Goodstein also issued a recommendation to the district judge. Thereafter, the Clerk of Court randomly assigned the matter to this Court.

On March 26, 2003, Van Patten filed an answer to order vacating judgment and a request for a C.O.A. [Certificate of Appealability]. Van Patten also submitted several exhibits, including Exhibit A which is various letters and parts of letters. In addition, Van Patten filed a motion for appointment of counsel. (Docket #38).

On June 26, 2003, the Court of Appeals for the Seventh Circuit issued an order dismissing the appeal for lack of jurisdiction. The appellate court noted that Magistrate Judge Goodstein acknowledged his lack of authority to enter final judgment citing the March 7, 2003, order.

On August 5, 2003, Van Patten filed a "supplemental." Van Patten states that he has also provided an exhibit which indicates that the attorney appointed to represent him in this case has been found ineffective by the Office of Lawyer Regulation. Therefore, Van Patten believes that he is entitled to new counsel and that new counsel should have the opportunity to submit the evidence that the ineffective counsel failed to submit.

Analysis

As indicated by the procedural history, there a number of matters to be addressed. Magistrate Judge Goodstein has vacated the January 17, 2003, judgment and converted his decision and order to a recommendation. Therefore, both of Van Patten's February 2003, motions for extension of time relating to a certificate of appealability are moot and will be denied.

With respect to Van Patten's motion for appointment of counsel and the information contained in the August 5, 2003, supplemental, a July 2, 2003, letter from the Supreme Court of Wisconsin's Office of Lawyer Regulation, indicates that the Office of Lawyer Regulation filed a 25-count disciplinary complaint against the appointed counsel in this case, Elizabeth Cavendish-Sosinski. Some of the allegations of the complaint relate to Van Patten. As outlined in the letter, that matter is in the early stages — Ms. Cavendish-Sosinski had not been served with the complaint as of July 2, 2003, and had various options including defending herself against the charges.

There is no right to counsel in a federal habeas corpus proceeding. *Wright v. West*, 505 U.S. 277, 293 (1992); *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987). Van Patten has been represented by counsel. Magistrate Judge Goodstein noted that Van Patten had corresponded with the court on multiple occasions concerning the effectiveness of his appointed counsel. Magistrate Goodstein concluded that the traverse submitted by Attorney Cavendish-Sosinski

was well-written and presented the "only" feasible arguments in this case. *(Recommendation to District Judge* at 8.) This Court concurs with that conclusion.

Furthermore, although Van Patten refers to new evidence which another appointed attorney could present, Van Patten has submitted letters written prior to sentencing. Transcripts of the relevant state court proceedings have been submitted as a part of the answer. Van Patten provides no indication of the nature of any additional new evidence that could be proffered. Therefore, upon due consideration of the foregoing, this Court will deny Van Patten's motion for appointment of counsel.

The Court will now address Magistrate Goodstein's recommendation.[2] Although not labeled as an objection, the Court will construe Van Patten's March 26, 2003, answer to order vacating judgment and a request for a C.O.A. ("*Answer to Order*") as an

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[2] Consideration of the state court's adjudication of Van Patten's due process and ineffective assistance claims is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254). Under the AEDPA, a state prisoner who petitions for a writ of habeas corpus must establish that the state court adjudication of his case was "contrary to, or involved an unreasonable application of, clearly-established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Additionally, in reviewing the state trial and appellate courts' adjudication of an ineffective assistance claim, "federal courts MUST presume that all factual determinations made by the state courts, including credibility determinations, are correct, unless rebutted by clear and convincing evidence." *Murrell v. Frank*, 332 F.3d 1102, 1112 (7th Cir. 2003) (emphasis in original).

objection and will also consider Van Patten's August 5, 2003, supplemental to that submission. Van Patten takes issue with the statement in Magistrate Judge Goodstein's recommendation that Van Patten did not contact other attorneys for advice in overturning a plea prior to sentencing. Van Patten states that he has submitted Exhibit A which he describes as nine pages of letters written to Attorney Nila Robinson and Attorney James Connell prior to sentencing.

This Court is to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). In addressing Van Patten's claim that he was denied effective assistance of counsel under the Sixth Amendment, Magistrate Judge Goodstein stated that to prevail on his ineffective assistance claim, Van Patten must demonstrate that: 1) his counsel's performance fell below an objective standard of reasonableness, and 2) was so prejudicial as to either render the proceeding fundamentally unfair or the result unreliable. *Recommendation to District Judge* at 3; *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984). To satisfy the prejudice requirement, Van Patten must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

Magistrate Judge Goodstein noted that under *United States v. Cronic,* 466 U.S. 648 (1984), which was decided the same day as *Strickland,* the Supreme Court set out what is not so much a separate

test as an exception to the *Strickland* test. *Recommendation to District Judge* at 3 *(citing Hollenbeck v. United States,* 987 F.2d 1272, 1275 [7th Cir. 1993]). Magistrate Judge Goodstein concluded that the assistance of trial counsel was effective under *Strickland,* but ineffective under *Cronic. Recommendation to District Judge* at 3.

Concluding that trial counsel's appearance by telephone was a harmless error even though it was a violation of Van Patten's Sixth Amendment right of effective assistance of counsel, Magistrate Judge Goodstein reasoned that Van Patten had ample time to withdraw his plea before sentencing and therefore, Van Patten was not prejudiced and no violation of clearly established federal law occurred. *Id.* at 3-4. Magistrate Judge Goodstein noted that Van Patten had nearly two months to withdraw his plea and did not attempt to do so. *Id.* at 4. The Magistrate Judge further noted that although at his post-conviction motion hearing, Van Patten stated that he did not move to withdraw his guilty plea because he did not know that he could do so, Van Patten's "after-the-fact statement lacks credibility." *Id.* Magistrate Judge Goodstein concluded that it is unlikely that Van Patten would go for nearly two months without telling anyone that he wanted to change his plea, especially considering his willingness to seek advice from another legal source. *Id.* Magistrate Judge Goodstein noted that on September 12, 1995, prior to the plea hearing in the Shawno County matter, Van Patten contacted Attorney Johnson, his attorney in a related matter in Waupaca County, to obtain that attorney's advice on the plea. *Id.* at 4-5.

In his *Answer to Order*, Van Patten states that he has now submitted letters written to Attorney Nila Robinson and Attorney James Connell, that Magistrate Judge Goodstein's statement is incorrect, and that he asked Attorney Robinson, Attorney Connell and Attorney Johnson how to take back this plea prior to sentencing. *Answer to Order* at 1. Van Patten further states that he informed the circuit court judge on two occasions — once in a letter stating that he was forced to take the plea due to District Attorney Bruno's threats to make sure that Van Patten would die in prison if he did not take the plea and that during sentencing he "requested to Judge Schmidt, that [he] wanted to take back his plea." *Id.* at 2.

Van Patten has submitted the first page of a letter date-stamped October 11, 1995, addressed to "Nila." (Exhibit [Exh.]A to the *Answer to Order* at 1 [unnumbered]). Due to the poor quality of the photocopy, portions are not readable. It does state that Van Patten "could see that he was not getting anywhere with both Attorneys Connell and Johnson they forced me into a plea. . ."

Next is the first page of a letter date-stamped January 17, 1995, to Nila Robinson. *Id.* at 2 [unnumbered]. Also included is the first page of a letter dated April 17, 1995, from Van Patten addressed "to whom it may concern" and received by the Board of Attorneys Professional Responsibility. *Id.* at 4 [unnumbered]. The letter states that Van Patten wants "to file a complaint about Mr. Connell's ineffective assistance." *Id.* While the letter makes specific com-

plaints about Mr. Connell, it does not state that he forced Van Patten into a plea agreement.

Also included is a letter date stamped January 12, 1995, from Van Patten to Mr. Connell. *Id.* at 5 [unnumbered]. It states that it is Van Patten's understanding that Van Patten would receive a breakdown on Bruno's offer and what was said between them on January 5, 1995. Also provided are three one-page letters from Attorney Nila Jean Robinson to Van Patten and a two-page letter from her to Van Patten. *Id.* at 3, 6-9 [unnumbered]). None of the letters contained in Exhibit A support Van Pattens' contention that he asked Attorney Robinson, Attorney Connell and Attorney Johnson how to take back his plea prior to sentencing.

Van Patten also states during sentencing he "requested to Judge Schmidt, that [he] wanted to take back his plea." *Answer to Order* at 2. Review of the transcript of the November 6, 1995, sentencing proceedings before Judge Earl W. Schmidt discloses that Van Patten spoke during the proceedings, but he did not state that he wanted to withdraw the plea. (Answer to Petition for Habeas Corpus, Exh. H, Transcript of November 6, 1995, Sentencing Hearing at 24-25).

Notably at the post-conviction motion hearing conducted by Judge Schmidt, Van Patten testified that he was "forced to take a plea bargain." (Answer to Petition for Habeas Corpus, Exh. J, Transcript of August 22, 1996, Post-Conviction Motion Hearing at 9). At that hearing, Van Patten also argued that he "was forced all the way." (*Id.* at 48).

At the close of the August 22, 1996, hearing, the trial court issued oral rulings on Van Patten's post-conviction motions. Judge Schmidt stated that "I think the record would indicate your right to an attorney was not violated and you were not coerced into [the plea]." *Id.* at 51. The trial judge further stated that "[y]ou were very cognizant of what your options were, and you agreed to do what the records reflects you did; and I believe that everything that we heard since then is because you didn't like getting 25 years." *Id.* The judge then denied Van Patten's motions for withdrawal of his plea and sentence modification. *Id.* at 52.

On appeal, the Wisconsin Court of Appeals noted the foregoing findings of the trial court. (Answer to Petition for Habeas Corpus, Exh E, *State of Wisconsin v. Joseph L. Patten,* No. 96-3036-CR, slip op. at 5-6 [Wis. Ct. App. May 28, 1997]). The appellate court stated that it had reviewed the record and found nothing to support Van Patten's allegation that counsel forced him to plead no contest. *Id.* at 6. The court of appeals further stated that "the record does not support, nor does Van Patten's appellate brief include, any argument that counsel's performance was deficient or prejudicial." *Id.* Therefore, the appellate court concluded that Van Patten's right to effective assistance of trial counsel was not violated. *Id.*

Based on this Court's review of the record and upon due consideration of Van Patten's arguments in his *Answer to Order,* this Court concludes that Van Patten has not demonstrated that he contacted

counsel about withdrawing his plea or that he told the judge during sentencing that he wanted to withdraw his plea. Moreover, even if Van Patten could demonstrate that he did so, the state court's finding that Van Patten was not coerced to enter the plea and that he only sought to withdraw it after he was sentenced to 25 years of incarceration, is a credibility determination which has not been rebutted. *See Murrell*, 332 F.3d at 1112.

The bar for establishing that a state court's application of the *Strickland* standard was "unreasonable" is a high one: the court of appeals for this circuit has stated that "'only a clear error in applying *Strickland* would support a writ of habeas corpus,'" *Dixon v. Snyder*, 266 F.3d 693, 700-01 (7th Cir. 2001). It is clear from the record before this Court, and review of the law, that the Wisconsin Court of Appeals properly identified and applied *Strickland* as the proper legal standard governing Van Patten's ineffective assistance claim. This Court cannot conclude that the state appellate court unreasonably applied the *Strickland* standard to the facts of the case and, therefore, this Court is without authority to grant Van Patten's petition for habeas relief. *See Bell v. Cone*, 535 U.S. 685, 694 (2002).

The Court concludes that Magistrate Judge Goodstein correctly determined that the assistance of trial counsel was effective under *Strickland*, but ineffective under *Cronic* and that trial counsel's appearance by telephone was a harmless error even though it was a violation of Van Patten's Sixth Amendment right of effective assistance of counsel. *Recommendation to District Judge* at 3-4. This Court

also concludes that Magistrate Judge Goodstein properly recommended that Van Patten's petition should be dismissed. Therefore, this Court will adopt Magistrate Judge Goodstein's recommendation.

In his *Answer to Order,* Van Patten also requests a certificate of appealability. However, at this time no appeal has been filed. Therefore, Van Patten's request for a certificate of appealability is premature. In the event Van Patten files an appeal from this Court's decision, he should file a request for a certificate of appealability indicating why he believes reasonable jurists would find this Court's assessment of the constitutional claims debatable. *See* 28 U.S.C. § 2253(c); *United States v. Slack,* 529 U.S. 473, 484 (2000). *See also, Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 1039 (2003).

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. McCaughtry's Motion to Substitute Thomas G. Borgen as Respondent (Docket #40) is **GRANTED,**

2. Van Patten's Motion for Extension of Time (Docket #33) is **DENIED,**

3. Van Patten's Motion for Extension of Time to File Certificate of Appealability (Docket # 34) is **DENIED,**

4. Van Patten's Motion for Appointment of Counsel (Docket # 38) **DENIED,**

5. Van Patten's Motion for Order (Docket # 39) is **DENIED.**

6. Magistrate Judge Goodstein's March 7, 2003, Recommendation to District Judge is **ADOPTED** and Van Patten's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **DENIED** and his petition is **DISMISSED.**

7. The Clerk of Court is **DIRECTED** to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 12th day of September, 2003.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
Chief Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOSEPH L. VAN PATTEN,

Petitioner,

v. **Case No. 98-C-1014**

GARY R. MCCAUGHTRY,

Respondent.

RECOMMENDATION TO DISTRICT JUDGE

Joseph L. Van Patten filed a petition for a writ of habeas corpus on October 19, 1998. After the petition was screened pursuant to Rule 4, Rules Governing Section 2254 Cases, the state was ordered to answer the petition. The State answered and the court granted the petitioner's motion for the appointment of counsel. Attorney Elizabeth Cavendish-Sosinski was appointed counsel and the court granted her an extension to reply to the State's answer to the habeas petition. On September 6, 2000, she filed a traverse and because the court did not order any further briefing, the petition was ready for resolution. Since then, the petitioner has filed a number of letters concerning the assistance that was provided to him by his Attorney Cavendish-Sosinski. The court will now address the merits of Van Patten's petition

and his concerns about the assistance of Attorney Cavendish-Sosinski.

In his petition, which was submitted pro se, Van Patten alleges that he was denied the effective assistance of counsel in violation of the Sixth Amendment because his attorney did not appear in person at his plea hearing, but appeared by telephone instead. Further, the plaintiff alleges that the attorney's appearance by telephone was in violation of Wisconsin State Law.

In its answer to the habeas petition, the State argues that even though the attorney's failure to appear in person may violate Wisconsin state law, there is no violation of clearly established federal law and consequently, the petition should be denied.

Because the petition does not have any significant legal analysis, the court would have required further briefing on the issue if not for the traverse filed by Attorney Cavendish-Sosinski on behalf of the petitioner. In the traverse, the petitioner argues that the failure of his attorney to be present for his entering of a guilty plea violated both his Fourteenth Amendment due process and Sixth Amendment rights.

Due Process

The petitioner argues in the traverse that he was denied fundamental fairness afforded by due process because his then-counsel (not Cavendish-Sosinski) was not present at the plea proceedings. The petitioner argues that he was denied the ability to have his counsel present to answer any questions he might have. Instead, he was left alone before a "foreboding court," unwilling to stand up for himself be-

cause he was afraid to anger the judge who would be handing down his sentence. In short, the petitioner argues that the appearance of his counsel by telephone was like having no counsel at all, which was fundamentally unfair and in violation of the Fourteenth Amendment.

The only infirmity that the petitioner finds in the plea proceeding is that his counsel appeared by telephone. Essentially, the Fourteenth Amendment due process claim is based upon the alleged ineffective assistance of counsel claim. However, the due process clause does not have its own guarantee of the assistance of counsel. Rather, the Fourteenth Amendment incorporates the Sixth Amendment's right to counsel and applies it to the states. See Gideon v. Wainwright, 372 U.S. 335, Consequently, there is no reason for a separate analysis of the petitioner's ineffective assistance of counsel claims under the Fourteenth Amendment. Therefore, the court turns to the Sixth Amendment analysis.

Sixth Amendment

The petitioner argues because his attorney was not physically present at his plea proceedings, his Sixth Amendment right to effective counsel was violated under either of the tests created by the United State Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) or United States v. Cronic, 466 U.S. 648 (1984), which were decided on the same day.

Strickland is a two-pronged test. The first prong requires the court to determine whether the defense counsel's assistance fell below "an objective standard of reasonableness." Hollenback v. United States, 987

F.2d 1272, 1275 (7th Cir. 1993). However, there is a strong presumption that the counsel's conduct is reasonable. Id. In the second prong, the court must determine whether counsel's performance was so prejudicial as to either render the proceeding fundamentally unfair or the result unreliable. Id.

Cronic, is not so much a separate test as it is an exception to the two-pronged Strickland test. Hollenback at 1275. Under Cronic, when an accused is denied the assistance of counsel at a critical stage in his trial, that counsel's actions will be deemed so egregious and prejudicial that ineffective assistance of counsel is presumed. Id. A critical stage is defined as "one where potential substantial prejudice to [a] defendant's rights inheres in the particular confrontation and where counsel's abilities can help avoid that prejudice." Id.

Here, the assistance of the petitioner's trial counsel, Attorney Connell, was effective under Strickland, but ineffective under Cronic. However, Connell's appearance by telephone was a harmless error even though it was a violation of Van Patten's Sixth Amendment right to the effective assistance of counsel. The court acknowledges that Attorney Connell's appearance by telephone at the plea proceeding is not authorized by Wis. Stats. § 967.08, which allows telephone appearances in certain other situations. Even though a violation of state law occurred, it did not prejudice the petitioner or cause a violation of clearly established federal law. This is because under Wisconsin law, the petitioner had ample opportunity to withdraw his plea before sentencing.

In Wisconsin, two different standards apply when a defendant moves to withdraw his plea, depending on when the motion occurs. State v. Thomas, 605

N.W.2d 836, 842 (Wis. 2000). If the defendant moves to withdraw the plea before sentencing, a circuit court should permit the withdrawal for any fair and just reason. Id. The defendant must prove that a fair and just reason exists by a preponderance of the evidence. Id. However, if the motion to withdraw the plea occurs after sentencing has taken place, the defendant has the heavy burden of establishing by clear and convincing evidence that the trial court should permit the defendant to withdraw his plea to correct a manifest injustice. Id. at 843.

In this case, Van Patten entered his guilty plea on September 12, 1995, but his sentencing was not until November 6, 1995. Van Patten, had nearly two months to attempt to withdraw his plea. Certainly, had he argued that his attorney's appearance by telephone violated Wisconsin law and adversely affected the voluntariness of his plea, this would have constituted a "fair and just reason" to permit a withdrawal. However, he did not attempt to withdraw his plea. And although the petitioner, in his post-conviction hearing states that he did not move to withdraw the plea because he did not know that he could do so, (Respondent's Exhibit J at 25), this after-the-fact statement lacks credibility. It is unlikely that the petitioner would go for nearly two months without telling anyone that he wanted to change his plea, especially considering his willingness to seek legal advice from another source. The petitioner contacted Attorney Johnson, his attorney in a related matter in Waupaca County on September 12, 1995 , before he entered his plea to obtain that attorney's advice on the plea. (Exhibit J at 7, 38-40). However, Attorney Johnson would not comment on the plea other than to tell the petitioner how it might affect

his Waupaca County trial. (Exhibit J at 38-40). Therefore it is reasonable to infer that if the petitioner was unhappy with the guilty plea he entered, he would have sought further advice from Attorney Johnson or would have contacted another attorney prior to sentencing to express his unhappiness with the plea.

Although not raised in his habeas corpus petition, at his post-conviction hearing the petitioner argued that he was intimidated into pleading guilty by both his attorney and the prosecutor. (Exhibit J at 9). This argument is belied by the fact that Van Patten was not too intimidated to call his other attorney to solicit advice about the plea agreement moments before he was to enter the plea.

In addition, his argument that he was intimidated by Attorney Connell contradicts his ineffective assistance of counsel claims. According to Van Patten, Connell's appearance by telephone was enough to intimidate him, but not enough to provide meaningful assistance.

Further, at the sentencing, at which time Connell was physically present, the petitioner acknowledged to the court that he entered into the plea voluntarily and that he understood the legal proceedings and his legal rights. (Exhibit J at 14-26). It was not until he received his sentence that Van Patten first voiced dissatisfaction with the plea. Before entering his guilty plea to first degree reckless homicide, Attorney Connell told Van Patten that he thought that he could get him a ten-year sentence and that he thought that Van Patten would be out in four or five years. (Exhibit J at 10). However, the court sentenced him to a twenty-five year sentence. (Exhibit I at 27). It is only after this larger sentence was

handed down did Van Patten express his desire to withdraw his plea. He did attempt to withdraw his plea at a post-conviction hearing, but he was unable to prove by clear and convincing evidence that the failure to allow his plea to be withdrawn would result in a manifest injustice.

Under Strickland, after applying Cronic, even if the court would conclude that Attorney Connell's conduct was unreasonable, because it was in violation of the Wisconsin Statute, the above facts clearly indicate that Connell's failure to appear in person was not so prejudicial as to render the proceedings unfair or make the end result unreliable. Consequently, Van Patten was not denied the effective assistance of counsel under Strickland.

Attorney Connell was physically absent at a critical stage of the trial. Under Hollenback, a critical stage is one where a substantial prejudice is inherent in the confrontation and the presence of counsel help to avoid the prejudice. Hollenback, 987 F.2d at 1275. The Wisconsin statute allows attorneys to appear by telephone at some proceedings and not at others. Wis. Stats. § 967.08. The proceedings where attorneys are allowed to appear by telephone are the type of proceedings that do not have the inherent prejudice that Hollenback addresses. Consequently, implicit in the statute is the notion that any proceeding not listed in the statute is so critical that counsel should be present. Therefore, the plea proceeding where Van Patten entered his guilty plea is a critical proceeding and therefore the Cronic analysis is applicable.

Under Cronic, Attorney Connell's assistance is presumed to be ineffective and in violation of the Sixth Amendment. And although Van Patten does

not need to prove that he was prejudiced under the Cronic analysis, it does not mean that a finding of ineffective counsel under Cronic automatically leads to a reversal.

In some situations where counsel was absent from a critical stage of the trial, the court must review the constitutional violation to determine whether it was a harmless error. Siverson v. O'Leary, 764 F.2d 1208, 1217 (7th Cir. 1985) (holding that constitutional violation that arose out of attorney's complete absence from the courtroom during jury deliberations and the verdict was harmless); see *also* United States v. Morrison, 946 F.2d 484, 503-04 (7th Cir. 1991) (holding that constitutional violation that arose out of attorney's complete absence during return of the verdict was not harmful when the court, on its own initiative, polled the jury). A Sixth Amendment violation must affect and contaminate the entire criminal proceeding to justify dispensing with the harmless error analysis and presuming harmfulness. Morrison, 964 F.2d at 503 (citing Satterwhite v. Texas, 486 U.S. 249, 257 (1988)). The Seventh Circuit noted that one instance where the absence of counsel would be harmful is at the arraignment in a capital case. Siverson, 764 F.2d at 1217.

Here, the court cannot say that the Sixth Amendment violation affected and contaminated the entire case. Attorney Connell did appear at the plea proceeding by telephone, which means that Van Patten was not completely without the assistance of counsel. The transcript of the plea proceeding indicates that Attorney Connell took an active part in the plea proceeding. Exhibit H. Further, there is no indication that Attorney Connell would have done

anything different if he had been present in person. Additionally, the court conducted a significant colloquy with Van Patten to make sure that he understood the ramifications of his plea. Exhibit H at 6-15. And, as stated above, Van Patten had ample time and sufficient reasons to withdraw his plea, if that was what he wanted to do. As a result, the court must review the violation of Van Patten's Sixth Amendment right to see if it was harmless.

The reviewing court must find beyond a reasonable doubt that the constitutional violation was, in fact, harmless before it can call it a "harmless error." Chapman v. California, 386 U.S. 18, 22 (1967). For all the reasons stated in both the Strickland and Cronic analyses, the court concludes that Attorney Connell's appearance by telephone, although a Sixth Amendment violation under Cronic, was harmless beyond a reasonable doubt. Consequently, Van Patten's petition for a writ of habeas corpus should be denied.

Assistance of Counsel on Habeas Petition

Since Attorney Cavendish-Sosinski filed the traverse, the petitioner has corresponded with the court on multiple occasions concerning the effectiveness of his appointed counsel. Van Patten is concerned because his attorney has not communicated with him. Attorney Cavendish-Sosinski's traverse was well written and presented the only feasible legal arguments in this case. Once the traverse was submitted, there was nothing for Attorney Cavendish-Sosinski to do but wait for the court's decision. She is not to be blamed for the weight of the court's calendar and the delay in issuing a decision. The court is certain

that Attorney Cavendish-Sosinksi's representation was effective and competent. That being said, a letter to the petitioner, with a courtesy copy to the court to let the petitioner know that there was nothing more that she could do until the court issued a decision in the matter may have alleviated the petitioner's concerns and perhaps some headaches for Attorney Cavendish-Sosinski.

IT IS THEREFORE RECOMMENDED that Van Patten's petition for a writ of habeas corpus be **denied** and the petition and this case should be **dismissed.**

Dated at Milwaukee, Wisconsin, this 7th day of March, 2003.

/s/ Aaron E. Goodstein
AARON E GOODSTEIN
United States Magistrate Judge

COURT OF APPEALS
DECISION
DATED AND RELEASED

May 28, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3036-CR.

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH L. VAN PATTEN,
Defendant-Appellant.

APPEAL from an order of the circuit court for Shawano County: EARL SCHMIDT, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Joseph Van Patten appeals the denial of his motion to withdraw his no contest plea.[1] He asserts

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[1] The court also denied Van Patten's motion for sentence modification. However, because Van Patten's appeal only presents arguments pertaining to the denial of his motion to withdraw his no contest plea, we do not address the merits of his

that his right to counsel was violated because his attorney appeared at the plea hearing by telephone, contrary to § 967.08, STATS. Van Patten also asserts his Sixth Amendment right to counsel was violated when his attorney discussed the plea offer with him by telephone and appeared at the hearing by telephone, resulting in his incomplete understanding of the charges against him and the constitutional rights he was waiving with his plea.

The State argues the appearance of defense counsel by telephone at the plea hearing does not constitute a "manifest injustice" sufficient to justify the withdrawal of Van Patten's plea, and defense counsel's telephonic appearance at the plea hearing did not deny Van Patten his Sixth Amendment right to counsel. We agree with the State and affirm the order.

Van Patten was charged with one count of first-degree intentional homicide. Pursuant to a plea agreement, he pled no contest to a reduced charge of first- degree reckless homicide, in violation of § 940.02(1), STATS., and was sentenced to twenty-five years in prison. Van Patten's attorney discussed the plea agreement with him and appeared at the plea hearing over a speaker phone. The court denied Van Patten's postconviction motions for the withdrawal of his plea and sentence modification. He now appeals.

The trial court's decision to deny a postconviction motion for the withdrawal of a guilty or no contest plea is discretionary, and we will reverse only if there has been an erroneous exercise of discretion. *See* ***State v. Spears***,

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motion for sentence modification. *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (An issue raised but not briefed or argued is deemed abandoned).

147 Wis. 2d 429, 434, 433 N.W.2d 595, 598 (Ct. App. 1988). To succeed on a motion to withdraw a no contest plea, the defendant must show "manifest injustice" by clear and convincing evidence. *Id.* Examples of manifest injustice include the following:

> (1) ineffective assistance of counsel; (2) the defendant did not personally enter or ratify the plea; (3) the plea was involuntary; (4) the prosecutor failed to fulfill the plea agreement; (5) the defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement; and, (6) the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement.

State v. Krieger, 163 Wis. 2d 241, 251 n.6, 471 N.W.2d 599, 602 n.6 (Ct. App. 1991) (citations omitted). Additionally, the violation of the defendant's Sixth Amendment right to counsel may constitute a manifest injustice.

Van Patten asserts that his attorney's appearance by telephone at the plea hearing violated § 967.08, STATS., which permits specifically enumerated proceedings to be conducted by telephone. We agree. Plea hearings are not included in the statute. In ***State v. Vennemann***, 180 Wis. 2d 81, 508 N.W.2d 404 (1993), our supreme court decided that the defendant's telephonic appearance for a postconviction evidentiary hearing was not permitted by § 967.08.

> Section 967.08 specifically enumerates proceedings intended to be included within the parameters of the statute. There is no mention of a postconviction evidentiary hearing. We apply the principle of statutory construction that a specific

> alternative in a statute is reflective of the legislative intent that any alternative not so enumerated is to be excluded. A postconviction evidentiary hearing . . . clearly is not a criminal proceeding which may be conducted by telephone.

Id. at 96-97, 508 N.W.2d at 410 (citation omitted). Pursuant to the logic of *Vennemann*, Van Patten is correct that his attorney's telephonic appearance at the plea hearing does not conform to the provisions of § 967.08(2), STATS.[2]

Van Patten asserts the court's procedural error denied him his Sixth Amendment right to counsel. We review issues of constitutional fact de novo. *See State v. Turner*, 136 Wis. 2d 333, 344, 401 N.W.2d 827, 832 (1987). A criminal defendant's right to counsel is guaranteed by the Sixth Amendment to the United States Constitution and by art. I, § 7, of the Wisconsin Constitution. Van Patten claims the lack of his attorney's physical presence at the plea hearing violated his right to counsel. We disagree.

The plea hearing transcript neither indicates any deficiency in the plea colloquy, nor suggests that Van Patten's attorney's participation by telephone interfered in any way with his ability to communicate with his attorney about his plea. Van Patten confirmed that he had thoroughly discussed his case and plea decision with his attorney and was satisfied with the legal representation he had received. The court gave Van Patten the opportunity to speak privately with his attorney over the phone if he had questions about the plea, but Van Patten declined.

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[2] Because we conclude that § 967.08(2), STATS., does not permit plea hearings to be conducted by telephone, we do not address Van Patten's additional argument that, contrary to § 967.08(2), he did not consent to the telephonic proceedings.

Further, when Van Patten exercised his right to allocution at sentencing, in the personal presence of his attorney, he raised no objection to his plea. We conclude Van Patten knowingly and voluntarily entered his plea, despite the lack of his attorney's physical presence at the plea hearing. The court's failure to conform with § 967.08, STATS., was harmless error, and neither interfered with Van Patten's understanding of the plea nor resulted in manifest injustice.

The right to counsel includes the right to effective assistance of counsel. ***McMann v. Richardson***, 397 U.S. 759, 771 n.14 (1985). In order to prove ineffective assistance of counsel, the defendant must establish that his attorney's performance was both deficient and prejudicial. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50, 54 (1996) (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)).[3] [FN3] Counsel's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. To demonstrate prejudice, the defendant must allege facts to show "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Bentley, 201 Wis. 2d at 312, 548 N.W.2d at 54 (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

The standard of review of the performance and prejudice prongs of ***Strickland*** is a mixed question of law and

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[3] ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to guilty or no contest pleas based on ineffective assistance of counsel. ***Hill v. Lockhart***, 474 U.S. 52, 57-58 (1985); ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50, 54 (1996).

fact, and the trial court's findings of fact will not be overturned unless clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). The ultimate determination whether the conduct of an attorney constitutes ineffective assistance of counsel is a question of law we review de novo. ***Id.*** at 128, 449 N.W.2d at 848. The trial court decided that Van Patten's right to counsel was not violated and he was not coerced into making the no contest plea because, aware of his options, Van Patten agreed to enter the plea. We have reviewed the record with due deference to the trial court's findings, and find nothing to support Van Patten's allegation that counsel forced him to plead no contest. The record does not support, nor does Van Patten's appellate brief include, any argument that counsel's performance was deficient or prejudicial. Therefore, we conclude Van Patten's right to effective assistance counsel was not violated. No manifest injustice exists to support plea withdrawal.

By the Court.—Order affirmed.

STATE OF WISCONSIN
CIRCUIT COURT FOR MENOMINEE/SHAWANO CO.
SHAWANO COUNTY DIVISION – BRANCH NO. I

STATE OF WISCONSIN,	)	
Plaintiff,	)	
-vs-	)	CASE NO. 94-CF-73
JOSEPH L. VAN PATTEN,	)	
Defendant.	)	

POSTCONVICTION MOTION HEARING
(AUGUST 22, 1996)

Whereupon the following proceedings were had upon a hearing held in the above-entitled matter before the HONORABLE EARL W. SCHMIDT, Presiding Judge of Branch No. I of the Circuit Court for Menominee/Shawano Counties, State of Wisconsin, commencing on Thursday, August 22nd, 1996, at 10:15 a.m., at the Shawano County Courthouse in Shawano, Wisconsin.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:
Mr. GARY ROBERT BRUNO
DISTRICT ATTORNEY

ON BEHALF OF THE DEFENDANT:
DEFENDANT APPEARS IN PERSON IN CUSTODY AND BY:

MR. OWEN F. MONFILS
APPOINTED ASSISTANT STATE PUBLIC DEFENDER (GREEN BAY, WI)

* * * * * * *

(Whereupon the following proceedings were had and testimony was taken upon the hearing held in the above-entitled matter before the Court at said time:)

[witnesses' testimony omitted]

[arguments of counsel omitted]

ORAL RULINGS BY THE COURT:

Well, I think the totality of the transcripts and your testimony would indicate what you wanted was a short time in prison. I think that's what the Court gathers from that, and, of course, that's not uncommon. There's a common denominator among people engaged in criminal behavior, and I suppose those who are not criminals -- and that's why the average person doesn't become a criminal -- is that they don't want to spend any time in jail. He doesn't want to be locked up. Regardless of the things we do, we still think we should not have to spend a lot of time incarcerated. So the crux of everything the Court has heard here is that you are not satisfied with the sentence that you received. That's what the Court hears here, and you certainly are not alone in that.

As to your alternative motion for modification of sentence, the record here totally reflects that you were very cognizant of trying to get the plea lessened, and you alternately insisted on a trial, which from your experience in the affairs of life means if you take a tough stance, you probably come out better, and you engaged in negotiations, and you eventually decided you were going to take a plea, and it was -- most of your negotiations with your

attorney were by phone, so Mr. Connell set it up, and he appeared by phone, and you were here.

Now, just because you didn't get the sentence that Mr. Connell thought he was going to argue for certainly doesn't mean you have a right to come in here and withdraw your plea. That would not be a basis to do that. The Court gave you the sentence it thought was proper for the act that was committed. It was for taking the life of someone else with a gun. What more can you say about that?

As to whether or not his right to an attorney was violated because the attorney was on the phone, I don't know of any precise law right on the point. But if his argument is that he was forced by his attorney to do this, an attorney on the phone is certainly less intimidating than one standing right next to him. So that's not consistent at all with what he is trying to tell the Court here. If he thought this attorney was forcing him to do it, it certainly would be easier to say, "Well, the guy is on the phone, but, Judge, he's making me do it," and we all know that that would have been the end of it right there. That's not what happened. What happened was he went right along with this because he thought this was the best deal he could get, because he knew what happened to Mr. Anderson. He had shot him. He thought, "Well, I have to get the best deal I can because there's nice things in the world and this would be the quickest way for me to get out of jail." That's what he was thinking, and I don't think his right to an attorney was violated. Mr. Connell is a competent attorney, and the Court knows that, and he got a lesser charge. He thought if he could get the Court to go with 10 years he would probably be out on parole in four or five. I guess that's probably not pie-in-the-sky thinking in any case. I don't even know what your parole date is right now. It probably isn't that far away, for all the Court knows. I don't know, but I think this record would indicate your right to an attorney was not violated and you were not coerced into doing this. You were very cog-

nizant of what your options were, and you agreed to do what the record reflects you did; and I believe that everything that we heard since then is because you didn't like getting 25 years. Well, that's what the Court thought you should get, and I think it was the proper sentence for taking another person's life, and I still think that's the proper sentence. So there will be no modification of that, and the Court denies all motions.

[discussion of unrelated matters omitted]